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Supreme Court, U.S.
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No. 94-1418

In The

Supreme Court of the United States

October Term, 1994

STATE OF MISSOURI ex rel. GEORGE A. CHIAVOLA and CONNIE S. FLOTT,

Petitioners,

vs.

THE VILLAGE OF OAKWOOD, MISSOURI, WILLARD S. NORTON, JOHN W. GRIMWADE, MORRIS L. PHILLIPS, L. HOMER ORR and J. JERRY SHIELDS,

Respondents.

On Petition For Writ Of Certiorari
To The Missouri Court Of Appeals, Western District

REPLY BRIEF OF PETITIONER

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April 5, 1995

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ARGUMENT

I. PETITIONER PROPERLY PRESERVED THE FEDERAL CONSTITUTIONAL ISSUE OF SUBSTANTIVE DUE PROCESS ON APPEAL TO THE HIGHEST STATE COURT, AN ISSUE IN WHICH THE FEDERAL CIRCUIT COURTS OF APPEAL ARE IN GREAT CONFLICT, AND WHICH WILL BE RESOLVED BY A GRANT OF CERTIORARI IN THIS CASE.

The federal circuit courts of appeal are in irreconcilable conflict regarding the proper standard of review to apply to federal substantive due process challenges of

local zoning decisions. *Pearson v. Town of Grand Blanc*, 961 F.2d 1211, 1217 (6th Cir. 1992). It is unlikely that this conflict can be resolved by the federal circuits, and can only be resolved by this Court. This Court's resolution of the conflict is likely to have great future consequences for property owners and local governments concerning challenges to local zoning decisions based upon either substantive due process or "taking without just compensation" arguments.

Respondent asserts that this issue may not be reviewed by a grant of certiorari. In this case, the Petitioners properly preserved a facial challenge of the Village of Oakwood's planless zoning ordinance on both federal and state substantive due process grounds. State substantive due process, however, was the only constitutional issue discussed by the court below. *State ex rel. Chiavola v. Village of Oakwood*, Petition Appendix (Pet. App.) at A5. It is well established that state court remedies must be sought before filing a claim in federal court which challenges local zoning decisions, because *federal courts* are loathe to become super zoning agencies. *See Nestor Colon Medina Sucesores, Inc. v. Custodio*, 964 F.2d 32 (1st Cir. 1992); *Amsden v. Moran*, 904 F.2d 743 (1st Cir. 1990), *cert. denied*, 111 S.Ct. 713 (1991). This case is coming to the Court through the standard procedural posture of certiorari from a decision of the highest state court. The only way to resolve Petitioners' federal substantive due process claim is through this Court's *certiorari* review, which will necessarily involve the federal circuit courts of appeal standards applied to substantive due process challenges of local zoning decisions.

Respondents misunderstand the analogies made to this Court's analysis of takings challenges under the Fifth and Fourteenth Amendments. *Lucas v. South Carolina Coastal Comm'n*, 112 S.Ct. 2886 (1992), stands for the proposition that this Court is prepared to create *per se* categories for constitutional violations of property rights. *Dolan v. Tigard*, 114 S.Ct. 2309 (1994), demonstrates this Court's emphasis on land use planning and proper planning studies and findings as a valid and necessary prerequisite to municipal zoning regulations. Petitioners do not raise at this time and on this appeal the "as applied" takings issues, which are reserved for trial, although the taking issue is inextricably linked with any discussion of substantive due process challenges of local zoning decisions.[1]

II. TO AVOID ARBITRARY, CAPRICIOUS AND IRRATIONAL ZONING ACTION IN VIOLATION OF FEDERAL SUBSTANTIVE DUE PROCESS, THE VILLAGE OF OAKWOOD MUST CONDUCT SOME MINIMAL AMOUNT OF PLANNING TO GUIDE ITS ZONING DECISIONS, BUT NOT NECESSARILY CREATE A SEPARATE COMPREHENSIVE PLAN.

Respondent would have this Court believe that the only issue on appeal is whether a municipality is required to create a *separate* comprehensive plan. The legislature of

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[1] For example, Justice Stevens argues that the *Dolan* decision became unavoidably tangled with substantive due process analysis when the majority invalidated the City of Tigard's dedication requirement for issuing a building permit. *Dolan*, 112 S.Ct. at 2329 (Stevens, J., dissenting).

every state in the union has declared that there must be some form of comprehensive planning *process* to inform the judgment of a municipality in its zoning actions, regardless of whether that process is summarized in a separate document labeled the "comprehensive plan." Notes accompanying the Standard State Zoning Enabling Act of 1926 state that "the draftsmen intended to require some planning as an integral part of the zoning process." Pet. App. at A12. The Missouri legislature has declared that all municipalities must conduct comprehensive planning prior to enforcing its zoning ordinance, and this requirement is not optional, despite Respondents' assertion to the contrary.[2]

It is patently arbitrary and irrational for the Village to decide in 1955 that it should permanently restrict all property to single-family residential uses, following a private subdivision plat recorded in 1928.[3] The actions of

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[2] All references to the adoption of a "city plan" by a municipal zoning or planning commission in Missouri are couched in language designating mandatory requirements. "The [zoning or planning] commission *shall make and adopt* a city plan for the physical development of the municipality." MO.REV.STAT. § 89.340 (1994). "In preparation of the city plan, the commission *shall* make careful and comprehensive surveys and studies of the existing conditions and probable future growth of the municipality." *Id.* § 89.350 (emphasis added).

[3] The subdivision plat recorded in 1928 is reproduced in the appendix to this Brief at A1. The Village has represented that this is the only mapping document that accompanied the Village Trustees' decision to zone the entire Village as exclusively large-lot single-family residential uses. This map also represents the approximate configuration of the Village as it exists today. The large rectangle in the northwest corner of the Village, labeled "BLK 10", less the northeast corner, is owned by Chiavola and

the Village to enforce Ordinance No.10 over the past 40 years is by definition arbitrary, as the Village Trustees have no basis upon which to conclude that the residential lots are the only appropriate land uses for the Village without study and planning to support the rationality of that analysis. The Village Trustees and the Village Clerk admitted in the request for admissions and in deposition that the Village has conducted *no planning* and has legislatively adopted *no comprehensive plan*. These admissions are included in the trial court's official record, and served as the basis for the trial court to grant summary judgment on the facial unconstitutionality of Ordinance No.10.

III. GROSS FACTUAL INACCURACIES ARE RECITED BY RESPONDENTS IN THEIR BRIEF IN OPPOSITION, WHICH ARE HIGHLY MISLEADING TO THIS COURT.

The Village of Oakwood has conducted absolutely no planning in either the enactment or enforcement of its single zoning ordinance which limits all property in the Village to large-lot, single-family residential usage. When Ordinance No.10 was adopted in 1955, the Village Trustees decided that the Village should forever be limited to large-lot single-family residential land uses. The sole document informing the decision of the Village was a plat drafted in 1928 by a *developer* who initially created

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Flott, and the street along the western border of the Village is currently North Oak Trafficway. This document was recorded by a developer approximately 25 years before the Village was incorporated.

the subdivision which eventually became the Village. App., *infra*, A1.

In response to the first rezoning application submitted by Petitioners in 1988, the Village retained Richard Kellenberg to review the options available to the Village in response to the rezoning request including whether the Village should conduct planning. Kellenberg did not engage in any of the comprehensive planning processes that are required by Missouri statute. Kellenberg's short (six page) report on whether the Village should do a planning study did *not* suggest that the most appropriate response was to maintain the Village as exclusively single-family residential land uses. Kellenberg provided the Village with four possible land use studies, three of which would study whether all property fronting North Oak Trafficway, including Petitioners' property, should be rezoned to allow commercial usage to comport with the highly commercialized nature of North Oak.

Kellenberg was mindful that the one study option which continued to limit all land to residential uses *must be done with additional and "careful planning," so that this option "can be worked out without depriving anyone of property rights or values."* (Trial Exhibit P-2, at p. 5) The Village never heeded Kellenberg's warning to conduct planning or studies to protect property rights and values. The Village has taken no legislative action to study or plan any of Kellenberg's study options, and has not adopted a plan or conducted any studies to adequately determine if the Village should permit commercial land uses within the Village. The trial court rejected the Village contention that it had done planning on the basis of the Village's own admissions.

Respondents would also have this Court believe, and repeatedly emphasize, that Oakwood is a "small bedroom community". Petitioners' property is a six-acre parcel of land on one of the largest and most highly commercialized transportation corridors in the Kansas City Metropolitan Region. What the Village Trustees may have envisioned in 1955 as the ideal setting for their homes does not comport with the present nature of the Village. Over 25,000 motor vehicles pass by Petitioners' property on the western border of the Village each day. Directly across the road from Petitioners' property are numerous highly visual commercial uses, including several automobile dealerships, gasoline service stations, automobile and motorcycle repair shops, restaurants, fast-food establishments, and professional office buildings.

Respondents' efforts to mischaracterize Kellenberg's document as a comprehensive planning study, and continual mischaracterization of the Village as entirely residential in nature, underscores the Village's failure to conduct any comprehensive planning or conduct even minimal studies to adapt the Village to the highly commercialized traffic corridor which serves as the western border of the Village.

CONCLUSION

For all of the reasons stated in the Petition and this Reply, a Writ for Certiorari to the Missouri Court of Appeals, Western District, should be issued.

Respectfully submitted,

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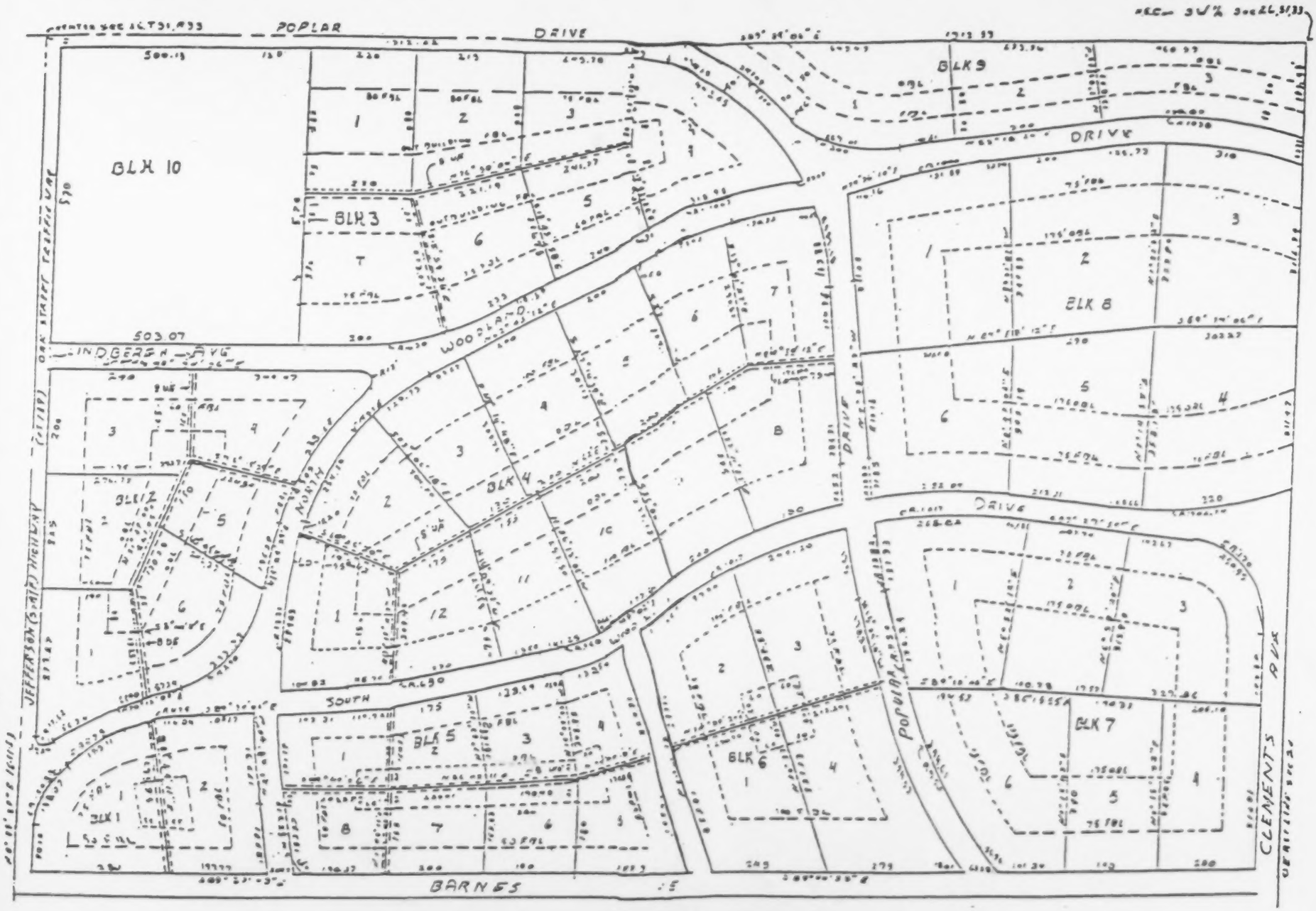
April 5, 1995

A1



OAKWOOD FIRST ADDITION

CLAY CO. ABSTRACT CO.

Liberty, Missouri

scale 1" = 200'

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